

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2009-0015
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
RUBEN CONDIDO RIVERA, JR.,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20080062

Honorable Robert Duber II, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Joseph T. Maziarz

Phoenix
Attorneys for Appellee

Emily L. Danies

Tucson
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B R A M M E R, Judge.

¶1 Appellant Ruben Condido Rivera, Jr., was convicted after a jury trial of possession of a deadly weapon by a prohibited possessor. On appeal he contends the prosecutor committed misconduct by eliciting from witnesses evidence the trial court had precluded when it granted Rivera's pretrial motion. He also contends the trial court erred by denying his related motions for mistrial. We affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Rivera's conviction. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On November 1, 2007, two Globe Police Department detectives, James Durnan and Gabriel Guerrero, saw Rivera driving a pick-up truck. Guerrero previously had seen Rivera driving the same truck on several occasions. Knowing there was a warrant outstanding for Rivera's arrest, and because he and Guerrero were in civilian clothes and driving an unmarked vehicle, Durnan called a uniformed officer in a marked patrol car for assistance. That officer stopped the truck.

¶3 After arresting Rivera and his passenger, for whom there also was an outstanding arrest warrant, the officer, Durnan, and Guerrero performed an inventory search of the truck because it was to be impounded.¹ They found a padlocked plastic container in the bed of the truck. Using a key on the key ring that also held the ignition

¹Police officers may conduct a warrantless administrative search of an impounded vehicle, so long as the search is routine and not a pretext for concealing an investigatory police motive. *See South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976).

key to the truck, Guerrero opened the container and found, among other items, clothes and tools that Rivera admitted belonged to him. Guerrero also found a handgun inside an open bag in the container. Ammunition of the same type used in the handgun was found in the truck's cab. Rivera denied the handgun was his, insisting it belonged to his mother.

¶4 Rivera's parents, Angelina and Ruben Rivera, Sr., arrived at the location where Guerrero had been arrested and tried to prevent officers from impounding the truck, which was registered in Angelina and Ruben's names. Angelina told the officers the gun was hers, but she and Ruben both said they did not know how the gun got in the truck. At trial, however, both testified they had placed the gun in the truck. Rivera was charged with one count of knowing possession of a deadly weapon by a prohibited possessor. A jury found him guilty of that charge and the trial court sentenced him to the presumptive, ten-year prison term.² This appeal followed.

Discussion

¶5 Before trial, Rivera moved to preclude evidence his driver's license had been suspended and evidence there had been an outstanding warrant for the arrest of his passenger. The trial court granted the motion, but ruled it would permit the state to introduce evidence there had been an outstanding warrant for Rivera's arrest. Guerrero testified at trial, however, that the passenger was unable to drive the truck from the scene because he had been arrested pursuant to an outstanding warrant. Rivera moved for a mistrial, arguing the state had violated the court's order precluding that evidence. The

²Rivera and the state stipulated he had six prior felony convictions.

court denied Rivera's motion. Rivera declined the court's offer to give the jury a curative instruction concerning Guerrero's statement that there had been an outstanding warrant for the arrest of Rivera's passenger. Durnan later testified Rivera's driver's license had been suspended. Rivera again moved for a mistrial. Although the court denied the motion, shortly after Durnan made the statement, it instructed the jury to disregard the evidence that Rivera's license had been suspended.

¶6 Rivera asserts on appeal that the trial court "erred in denying [his] motions for mistrial" and "thus prosecutorial misconduct occurred." "Prosecutorial misconduct 'is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which [s]he pursues for any improper purpose with indifference to a significant resulting danger of mistrial.'" *State v. Aguilar*, 217 Ariz. 235, ¶ 11, 172 P.3d 423, 426-27 (App. 2007), *quoting Pool v. Superior Court*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984). To prevail on a claim of prosecutorial misconduct, "[t]he defendant must show that the offending [conduct], in the context of the entire proceeding, 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. Newell*, 212 Ariz. 389, ¶ 60, 132 P.3d 833, 846 (2006), *quoting State v. Hughes*, 193 Ariz. 72, ¶ 26, 969 P.2d 1184, 1191 (1998). "A defendant is denied a fair trial because of prosecutorial misconduct if there exists a reasonable likelihood that the misconduct could have affected the jury's verdict." *State v. Bracy*, 145 Ariz. 520, 526, 703 P.2d 464, 470 (1985).

¶7 “Because the trial court is in the best position to determine the effect of [prosecutorial misconduct] on a jury, we will not disturb a trial court’s denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of discretion.” *Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d at 846. “[A] mistrial is a ‘most dramatic’ remedy that ‘should be granted only when it appears that that is the only remedy to ensure justice is done.’” *State v. Blackman*, 201 Ariz. 527, ¶ 41, 38 P.3d 1192, 1203 (App. 2002), quoting *State v. Maximo*, 170 Ariz. 94, 98-99, 821 P.2d 1379, 1383-84 (App. 1991).

¶8 Even assuming the prosecutor committed misconduct,³ Rivera has not established there is a reasonable possibility the detectives’ statements could have affected the jury’s verdict. *See Bracy*, 145 Ariz. at 526, 703 P.2d at 470. Given that the jury had been informed Rivera had been arrested on an outstanding warrant, any risk the jury’s verdict may have been affected by Durnan’s statement that Rivera had a suspended driver’s license was plainly negligible. In any event, the trial court instructed the jury to disregard that statement. *See State v. Velazquez*, 216 Ariz. 300, ¶ 53, 166 P.3d 91, 103 (2007) (“no reversible error occurred” where trial court instructed jury to disregard improper statement). And in light of the fact the jury was already aware there had been a warrant for Rivera’s arrest, Guerrero’s statement that there was also an outstanding warrant for the passenger’s arrest, which explained why the passenger could not drive the

³We note the prosecutor had warned Durnan not to discuss the fact Rivera’s license was suspended. *See State v. Brewer*, 110 Ariz. 12, 16, 514 P.2d 1008, 1012 (1973) (finding no error where “there was no evidence of misconduct on the part of the State such as failure to adequately warn the witness not to give [improper] testimony”). The prosecutor admitted, however, that he had not told Guerrero not to mention the passenger had been arrested pursuant to a warrant.

truck away, thereby permitting an inventory search, could have had no appreciable effect on the jury's verdict. Moreover, Rivera declined the court's invitation for a curative instruction. *See State v. Herrera*, 203 Ariz. 131, ¶ 6, 51 P.3d 353, 356 (App. 2002) (noting defendant declined curative instruction in concluding court did not err in denying mistrial motion).

¶9 Additionally, the remote possibility these statements influenced the jury's verdict further wanes when we consider the strength of the state's case. *Cf. State v. Brown*, 125 Ariz. 160, 162, 608 P.2d 299, 301 (1980) (“[W]here evidence is erroneously admitted, reversal is required only when it is reasonably probable that, absent the tainted evidence, the jury would have reached a different conclusion.”). The handgun was found in a container in the truck along with several items Rivera had admitted belonged to him. Ammunition for the handgun was found in the truck's cab. Both detectives testified they previously had seen Rivera driving the truck. And Rivera's parents testified they had placed the handgun in the truck, conflicting with their previous statements to law enforcement officers that they did not know the handgun was there and had no idea how it got there. Thus the trial turned in part on the jury's assessment of Rivera's credibility, a topic none of the inappropriate testimony addressed. The trial court did not abuse its discretion in denying Rivera's motions for mistrial.

Disposition

¶10 We affirm Rivera's conviction and the sentence imposed.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge